AFFIN CREDIT (M) SDN. BHD.

v.

YAP YUEN FUI

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 201 OF 1983]
20 JANUARY 1984

CONTRACT: *Hire Purchase - Agreement to let car on hire purchase - Failure to give written statement to hirer before written offer - Contravention of s. 4(1), Hire Purchase Act - Effect.*

The plaintiff let to the defendant a motor car under a hire purchase agreement. On the defendant falling in arrears with the payment of the monthly instalments, the plaintiff repossessed the car, sold it and sued the defendant for the balance outstanding under the agreement. Judgment was given to the defendant by both the Sessions Court and the High Court. On the plaintiff's appeal to the Federal Court, the only issue for determination was the effect of the contravention by the plaintiff of s. 4(1) of the Hire Purchase Act 1967 (Revised 1978) ("the Act"). The plaintiff had not given the defendant a written statement before the written offer signed by the defendant.

Held :

There was no agreement between the parties. An offer to enter into a hire purchase agreement either by the owner or the hirer is subject to a condition precedent imposed by s. 4(1) of the Act. It contains a positive and mandatory obligation on the part of the owner to give a written statement to the prospective hirer before an offer to enter into a hire purchase agreement can be accepted and thereby brings about the formation of an agreement. To give any other interpretation to the provision would make nonsense of the words used by the legislature. There is in fact no gap in the law. Section 4(1) modifies the law of offer and acceptance as provided by s. 2 of the Contracts Act 1950 (Revised 1974).

[Appeal dismissed.]

Cases referred to:

Magor and St. Mellons Rural District Council v. Newport Corporation [1952] AC 189
Printing and Numerical Registering Co. v. Sampson [1875] LR 19 EQ 462
Wallis v. Smith [1882] 21 Ch D 243

Legislation referred to:

Contracts Act 1950, s. 2
Hire Purchase Act 1967, ss. 4(1), 5(1), (2), 6(2), 34, 46

For the plaintiff/appellant - Vinayak P. Pradhan; M/s. Skrine & Co.
For the defendant/respondent - Manjit Singh; M/s. Manjit Singh Sachdev & Co.

JUDGMENT

Mohd. Azmi FJ:

It is the plaintiff's case that under a hire purchase agreement dated 14 August, 1980 the plaintiff let to the defendant a Toyota motor car for a total hire purchase price of RM34,482.34 payable by a deposit of RM7,052.50 and the balance by 36 monthly instalments of RM761.94 each, commencing on 14 September, 1980 together with interest at 8% per annum on any sum which might become overdue from time to time. The defendant fell into arrears in the payment of monthly instalments and the motor car was duly repossessed and sold by the plaintiff for the sum of RM12,000.00 on 10 April, 1981. The plaintiff's claim in the Sessions Court against the defendant was for the sum of RM13,174.97 being the balance outstanding under the hire purchase agreement as at 30 June, 1981. The defendant denied the whole claim and sought the protection of the Hire Purchase Act 1967 (Revised 1978). He contended that various provisions of the Act had not been complied with, and in particular the plaintiff had contravened the provision of s. 4(1) by failing to give him written statement consisting a summary of his financial obligations under the proposed hire purchase agreement as set out in the second schedule of the Act. He also complained that the plaintiff had failed to serve him with a copy of the hire purchase agreement within fourteen days of its execution, an obligation imposed on the plaintiff under s. 5(1) of the Act. The Sessions Court President found that both the provisions of s. 4(1) and 5(1) of the Act had been breached, and he dismissed the plaintiff's claim with costs. On appeal by the plaintiff to the High Court, Abdul Razak J was inclined to agree with plaintiff that on the evidence there was in fact compliance with the provision of s. 5(1), but he concluded that there was a clear violation of s. 4(1) by the plaintiff for failure to serve the statement in the second schedule on the defendant before the hire purchase agreement was entered. For such breach the learned Judge held that the plaintiff had failed to prove that it had entered into a valid and proper agreement with the defendant. In dismissing the plaintiff's appeal, the learned Judge gave the following main reasons:

> It becomes quite obvious therefore that the requirement of s. 4(1) is as fundamental and fatal for its non-compliance as that stated in s. 4(2), indeed even more so, because whereas in the former the absence of those terms would render the contract void *ab initio,* in the latter it is merely as s. 6 itself provides, unenforceable. The difference is thus between one where, because there was no offer within the meaning of the section, the contract has not come into existence yet, and the other where there is a valid contract, but could not be enforced because of the failure of the plaintiff to comply with some essential terms. In an unenforceable contract however the contract is valid but the party affected may use it as a defence to recover what has been paid or received (p.180 - Cheshire & Fifoot), but in an void contract *ab initio* no liability arises to either party (p. 335).

The plaintiff is dissatisfied with the Judge's interpretation of s. 4(1), and the appeal before us is solely on question of law as to whether non-compliance with the provision of s. 4(1) of the Hire Purchase Act 1967 would render a hire purchase agreement void *ab initio.* Thus, the only issue for determination is the interpretation of the provision of s. 4(1). It is not disputed that the plaintiff has breached that provision. What is in issue is the legal effect of such a breach.

We now set out the relevant parts of sub-sections (1), (2) and (3) of s. 4 :

> (1) Before any hire purchase agreement is entered into in respect of any goods the owner shall give or cause to be given to the prospective hirer a written statement duly completed in accordance with the form set out in the Second Schedule:

Provided that where the agreement is entered into by way of acceptance by the owner of a written offer signed by or on behalf of the hirer, the provisions of this subsection shall be deemed not to have been complied with unless the written statement was given to the prospective hirer before the written offer was signed.

(2) Every hire purchase agreement -

(a) shall be in writing;

(b) shall be signed by or on behalf of the hirer and all other parties to the agreement;

(c) shall -

(i) specify a date on which the hiring shall be deemed to have commenced;

(ii) to (vi) (not relevant);

(d) where any part of the consideration is or is to be provided otherwise than in cash, shall contain a description of that part of the consideration; and

(e) shall set out in a tabular form -

(i) the price ... described as "cash price";

(ii) the amount paid or provided by way of deposit ...;

(iii) any amount ... described as "freight";

(iv) any amount ... described as "vehicle registration fee";

(v) any amount ... payable for insurance;

(vi) the total of the amounts referred to in sub-paragraphs (i), (iii), (iv) and (v) less the deposit;

(vii) the amount ... described as term charges";

(viii) the total of the amounts referred to in sub-paragraphs (vi) and (vii) ... referred to as "the balance originally payable under the agreement"; and

(ix) the total amount payable.

(3) An owner who enters into a hire purchase agreement that does not comply with the provisions of subsection (2) shall be guilty of an offence under this Act.

Under sub-section (1) of s. 5, it is provided that the owner shall serve or cause to be served on the hirer within fourteen days after the making of a hire purchase agreement -

(a) a copy of the agreement;

(b) a notice, which is at least as prominent as the rest of the contents of the agreement, in the terms prescribed in the Third Schedule.

(Sub-sections (2) and (3) are not relevant)

Section 6 is as follows:

(1) A hire purchase agreement that is not in writing shall not be enforceable by the owner.

(2) An owner shall not be entitled to enforce a hire purchase agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer, and no security given by the hirer in respect of money payable under the hire purchase agreement or given by a guarantor in respect of money payable under such a

contract of guarantee as aforesaid shall be enforceable against the hirer or guarantor by any holder thereof, unless the requirements set out in Section 4(2)(b), (c), (d) and (e) and section 5 have been complied with :

Provided that, if the court is satisfied that a failure to comply with any of the requirements set out in the said provisions has not prejudiced the hirer, and that it would be just and equitable to dispense with such of the requirements, the court may, subject to any conditions that it thinks fit to impose, dispense with such of the requirements for the purpose of the action ."

Mr Pradhan argues that unlike s. 4(2), the Act is silent as to the effect of non-compliance with s. 4(1). Non-compliance with the requirements set out in s. 4(2) (b), (c), (d) and (e) and s. 5 shall under s. 6(2) render the hire purchase agreement unenforceable unless the proviso to that sub-section applies. But there is nothing in the Act to say that non-compliance with s. 4(1) would render the agreement unenforceable and much less void *ab initio.* Again, s. 4(3) makes it an offence punishable under s. 46 for not complying with the provisions of s. 4(2). Yet the Act does not provide for such penalty for the breach of s. 4(1). As such Mr. Pradhan submits that the Act could not have intended, as found by the learned Judge, that violation of the provisions of s. 4(1) would be more fatal than that of s. 4(2). Although we are not referred to it, we also note that non-compliance with s. 4(1) cannot by its very nature be brought within the ambit of s. 34 so as to render the agreement void. It is impressed upon us that the legislature has clearly deemed it fit not to provide anything in the Act for the consequences of non-compliance with s. 4(1) and therefore it is wrong for the Court to fill the gap and make provision for the consequences of non-compliance. In the main, Mr.Pradhan's argument is two-fold. Firstly, since ss. 4(3) and 6(2) have expressly provided for the consequences, both criminal and contractual for non-compliance with s. 4(2) but none whatsoever for s. 4(1), the principle that should be applied is *expressio unius est exclusio alterius;* and secondly, the Courts have no power to legislate where there is a gap in the provisions of a statute and for this legal proposition Counsel relies on the case of *Magor and St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189, 191, where the House of Lords in upholding the majority decision of the Court of Appeal, made scathing criticisms of Lord Denning's dissenting opinion. There it was held that in the construction of a statute, the duty of the Court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. To do so would be to usurp the function of the legislature.

Whilst we have no reason to disagree with the legal propositions advanced by Mr. Pradhan, we do not see how they are applicable in the circumstances of the present case. We are dealing with the interpretation of s. 4(1) of the Hire Purchase Act 1967 - a statute passed by parliament for the purpose of regulating not only the form but also the contents of the hire purchase agreement, and as well as the rights and duties of parties to such agreements. Part II of the Act which embodies all the relevant sections in this appeal, deals with the "formation and contents of hire purchase agreements". The words used in s. 4(1) are clear. *Absoluta sententia expositare non indiget*. The words mean what they say, and they plainly require a written statement in the form set out in the Second Schedule to be given or cause to be given to the prospective hirer **before any hire purchase agreement is entered into** (the emphasis is ours). Where the agreement is entered into by way of acceptance by the owner of a written offer signed by the hirer, which is the case in the present dispute, the proviso to s. 4 (1) also requires the written statement to be given to the prospective hirer **before the written offer was signed** (the emphasis is also ours). The plaintiff as the owner in this case

has conceded that it had not given the written statement to the defendant as prospective hirer before the written offer was signed on 14 August, 1980 (see exhibit AB1 at page 46 of Record). Now, what is the effect of defendant/hirer's offer in the formation of the agreement? Can such an offer without the requisite written statement being given to him before he put down his signature be a lawful offer capable of acceptance by the plaintiff/owner under the Act? That in our view is the pertinent and relevant questions to be asked in this appeal. As a general principle, in order to decide whether the parties have reached an agreement, it is usual to enquire whether there has been a definite offer by one party and an acceptance of that offer by the other. Section 4 (1) deals with entering into and formation of a contract; whereas s. 4 (2) and also ss. 5 (2) and 6 deal principally with the contents of the contract, after a lawful offer by the prospective hirer has been made and accepted. If there is no *consensus ad idem* under the Act and a contract has not been entered and therefore still not legally in existence, what is the purpose of the legislature dealing with it in ss. 4(3) and 6(2) as to the consequences of non-compliance? To do so would be totally futile. The exclusion of s. 4(1) from the provisions of ss. 4(3) and 6(2) supports the view that s. 4(1) deals merely with the entry stage of the agreement by making it mandatory for the promisee to give the written statement to the promisor before there can be a promise. Section 4(1) is self-contained. It modifies the law of offer and acceptance as provided by s. 2 of the Contracts Act 1950 (Revised 1974). The right to freedom of contract as expounded by Jessel MR in *Printing and Numerical Registering Co. v. Sampson* [1875] LR 19 EQ 462, 465 and *Wallis v. Smith* [1882] 21 Ch D 243, 266 has, consistent with modern tendency of statute law, been interfered with by the Hire Purchase Act. An offer to enter into a hire purchase agreement either by the owner or the hirer is subject to a condition precedent imposed by s. 4(1). Merely because s. 4(1) is not included in the provisions for non-compliance under ss. 4(3) and 6(2), it does not necessarily mean that there is a gap in s. 4(1) if the words therein are clear and free from ambiguity. Section 4(1) contains a positive and mandatory obligation on the part of the owner to give a written statement to the prospective hirer **before** an offer to enter into a hire purchase agreement can be accepted and thereby brings about the formation of an agreement. This is the plain meaning of such words as "Before any hire purchase agreement is entered into" and "unless the written statement was given to the prospective hirer" used in s. 4(1). There is no gap in that provision and there can be no other interpretation unless we want to make nonsense of the words used by the legislature. That would exactly be the result if we were to conclude that although the obligation imposed by the sub-section was mandatory it had practically no purpose and had no meaningful consequences. There being no gap in s. 4(1) and having regard to the plain language used, we hold that on the facts admitted, the plaintiff's claim was rightly dismissed by the lower Courts, not because the hire purchase agreement was unenforceable, but because no agreement had in fact been entered into by the parties. In this context the learned Judge was right in describing the agreement as void *ab initio* for lack of offer and acceptance. The written offer signed by the defendant without the condition precedent being fulfilled was not an offer recognised by the Hire Purchase Act and as such there could not be acceptance by the plaintiff of a non-existent offer.

This appeal is accordingly dismissed with costs.

Also found at [1984] 1 CLJ 149